Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS

Respectfully submitted,

AMERICA'S PUBLIC TELEVISION STATIONS

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SUMMARY

The comments of Association of America's Public Television Stations (APTS) on the Commission's Must Carry Notice primarily address the rules proposed to implement Section 5 of the 1992 Cable Act requiring must carry of all qualified local noncommercial educational stations.

As a general matter, APTS observes that 1) the clear language and legislative history of the 1992 Cable Act will and should control many of the decisions raised in the Notice; 2) clear, objective operational guidelines are in virtually every instance far preferable to vague grants of discretion of cable operators; and 3) it is essential that stations be given complete and timely notice by cable systems of all relevant carriage information.

As to specific issues, APTS recommends that:

1) municipally owned stations qualify for must carry only if they transmit noncommercial educational programming more than 50 percent of the broadcast week;

2) otherwise qualifying noncommercial stations qualify for must carry without regard to whether their broadcast channel is a reserved channel;

3) an objective subscribership standard be employed to determine a cable system's "principal headend," systems be required to give all potentially affected stations appropriate notice of the principal headend determination and the basis for it; and stations be given an appropriate opportunity to challenge that decision;

4) where cable systems have requests from qualified stations in excess of the statutory limits, systems be required to carry the nearest in-state stations;

5) "substantial duplication" for purposes of multiple state network affiliates and noncommercial station carriage limits be defined to include only stations that simultaneously transmit identical programming for a majority of the broadcast week and the Commission establish appropriate means, including selection of "representative weeks", by which stations and systems can determine and adjudicate whether they qualify under the proposed standard;

6) cable systems that are initially permitted by franchise authorities to utilize PEG channels for carriage of additional noncommercial stations must locate an appropriate channel for such stations whenever the franchise authority revokes PEG authority, even if it means displacement of another programming service;

7) clear and detailed notification procedures concerning which noncommercial stations are carried, the basis for those carriage determinations and an opportunity to challenge the determinations be established;

8) cable systems must be required to carry the primary video, audio and line 21 closed captioned transmissions without exception and the Commission should a) establish appropriate guidelines to ensure that claims of

"technical infeasbility" are not utilized to defeat the transmission of vital services to the handicapped, schools and second-language audiences and b) require that cable systems notify all stations of any material they strip from station signals and a full technical description of the basis for doing so;

9) the Commission investigate carefully whether cable systems should be permitted to strip ghost cancelling signals;

10) channel positioning disputes be resolved wherever possible by station-system negotiations and, in those instances where Commission intervention is required, the Commission should not adopt a formal priority system but should undertake case-by-case determinations that give appropriate weight to station investment in establishing a common channel number throughout its service area;

11) where a system cannot accommodate a noncommercial station on both the basic service tier and its on-channel station, the station should be carried on the basic tier of the cable system;

12) appropriate notification procedures be adopted for channel positioning or carriage deletion decisions; and,

13) appropriate remedies for system noncompliance be adopted.

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COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS

The Association of America's Public Television Stations (APTS) respectfully files comments in response to the Notice of Proposed Rule Making.[1/] APTS' comments primarily address the Commission's proposed rules to implement Section 5 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act" or the "Act"),[2/] which mandates cable carriage of noncommercial broadcast signals "to ensure that cable subscribers have access to local noncommercial educational stations which Congress has authorized . . . ." 1992 Cable Act, Section 2(a)(7).

APTS is a private, nonprofit membership organization whose members comprise virtually all of the nation's 345 public television stations. It represents its members on a national level by presenting public television stations' views

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1/ Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, MM Docket No. 92-259 (released Nov. 19, 1992) [hereinafter "Notice"].

2/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No., 102-385, 102 Stat. 1460 (1992).

to the Commission, Congress and other federal agencies and policy-makers. APTS is particularly qualified to comment on the proposed rules to implement Section 5 because this provision was based upon proposed legislation originally agreed upon and jointly submitted to Congress by APTS and the National Cable Television Association (NCTA) in 1990. Furthermore, APTS has been the principal advocate for must carry rules for public television stations before the Commission.[3/]

INTRODUCTION

Before addressing each of the specific questions raised by the Commission regarding Section 5 of the 1992 Cable Act, APTS believes a few over-arching observations are in order.

First, as APTS will demonstrate below, many of the issues raised in the Notice are in fact definitively resolved by the clear language of the Act and, when there is ambiguity, by its pertinent legislative history. Indeed, many provisions in Section 5 are self effectuating and require little or no interpretation. The Commission should reject the inevitable efforts of those who would revisit the legislative battles

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[3/] See Comments of the Association of America's Public Television Stations, MM Docket No. 90-4 (Feb. 14, 1991); Reply Comments of the Association of America's Public Television Stations, MM Docket No. 90-4 (March 1, 1991); Comments of the Association of America's Public Television Stations, MM Docket 90-4 (Sept. 25, 1991).

preceding the passage of the Act and seek to alter or undermine the Act through the implementation process.

Second, where implementing rules are necessary, the Commission should, where possible, provide guidelines for both cable systems and broadcasters that are not only clear and precise but as non-discretionary and objective as possible. In a number of instances, the Notice suggests leaving certain decisions regarding carriage of noncommercial stations up to the discretion of the cable system operator. And in at least one instance, that discretion is proposed to be bounded only by the prohibition that it not be used with the "intent" to subvert the statute.[4/]

Given the extensive findings by Congress of anticompetitive behavior by cable operators, APTS believes it would be inappropriate and counterproductive to leave substantial discretion regarding carriage of broadcast signals to cable operators. After extensive deliberations based in part on careful fact-finding by the Commission, Congress determined that cable operators have a substantial economic incentive to delete, reposition, or not carry local broadcast signals, and that mandatory carriage requirements were

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[4/] For example, the Notice proposes to permit cable operators (1) to identify their "principal headend" for the purposes of determining whether a noncommercial station is "local" to the cable system (Notice at ¶ 8); (2) to select stations that they will carry if they receive requests in excess of their carriage requirements (Notice at ¶ 12); and, (3) to resolve certain channel positioning disputes (Notice at ¶ 33).

necessary to ensure that cable subscribers have access to both commercial and noncommercial broadcast signals. [5/] Permitting cable operators to use their discretion on various carriage issues would undermine Congress' intent to restrain anticompetitive conduct on the part of cable systems by imposing carriage and channel positioning requirements.

Quite aside from the substantive likelihood that broad discretion will be abused, the history of animosity and distrust between cable and broadcasting virtually assures that a significant percentage of discretionary decisions will be contested, especially those involving cable operator "intent", and that Commission intervention will be sought. Precise, objective requirements not only will in most instances enable the parties to more easily comply with the requirements of the Act, they will minimize the instances in which the parties turn to the Commission for relief and enable the Commission to resolve disputes more rapidly.

[5/] See e.g. Sections 2(a)(5) (cable operators have the incentive and ability to favor their affiliated programmers); (8) (absent carriage requirements there is a substantial likelihood that citizens will be deprived of local public television services); (15) (cable systems have an economic incentive to terminate the retransmission of broadcast signals, refuse to carry new signals or reposition a broadcast signal to a disadvantageous channel position).

See also, FCC, Cable System Broadcast Signal Carriage Survey Report, Sept. 1, 1988; FCC, Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Service 5 FCC Rcd. 4962 (1990) (FCC Cable Report).

For similar reasons, it is essential that the Commission require that all information necessary to monitor a cable system's compliance with the Act be made available to the public generally and to all potentially affected stations in particular. As discussed further below, with respect to noncommercial broadcast stations, this information should include not only all pertinent information regarding the stations carried under Section 5, but all information necessary for a station not carried on a system to assess the basis for the cable system's determination not to carry it and its eligibility for carriage on the cable system. The information should, at a minimum, be placed in a public file at the cable system and at regular and all appropriate intervals, be served on all local noncommercial stations.[6/]

As with narrowly defined, objective standards, broad access to this information should serve to reduce the number of carriage disputes and to promote the expeditious resolution of disputes which nonetheless occur. In any event, this information is essential to enforcement of the Act and is, for the most part, uniquely within the purview of cable operators.

6/ A definition of "local" for these purposes is proposed at p. 11.

I. DEFINITION OF QUALIFIED LOCAL NONCOMMERCIAL EDUCATIONAL STATION

A. Definition of Qualified Noncommercial Educational Station

1. Municipally-Owned Stations

To be a "qualified noncommercial educational television station" under Section 5 of the 1992 Cable Act, a station can satisfy one of two sets of criteria. It must have a noncommercial license, be owned and operated by a public agency, nonprofit foundation, corporation or association, and be eligible to receive a community service grant from the Corporation for Public Broadcasting. § 5(l)(1)(A). Alternatively, it must be owned and operated by a municipality and transmit "predominantly noncommercial programs for educational purposes." § 5(l)(1)(B).

With respect to the municipally-owned station, the Notice asks what criteria should be used to determine whether such a station transmits "predominantly noncommercial programs for educational purposes."[7/] The Commission proposed that such a station should be deemed qualified if it transmits noncommercial educational programming for at least 50% of its broadcast week.

7/ The Commission also proposes to define "educational purposes" pursuant to Section 73.62(a) of the Commission's rules. APTS believes that this provision, which sets forth the eligibility requirements for noncommercial educational licensees, is the appropriate standard by which to determine if programming is for "educational purposes." A station that carries programming that does not meet this standard should not be eligible for carriage under Section 5.

This proposed interpretation is inconsistent with both the plain language of the statute and with the legislative history related to this provision. In general usage, "predominate" means "to hold advantage in numbers or quantity."[8/] "Predominantly" is, moreover, specifically defined in the House Report that accompanied H.R. 4850.[9/] A station transmits predominantly noncommercial programs for educational purposes if "more than one half of such a station's programming is noncommercial programming for educational purposes, as measured in broadcast hours." House Report at 104.

The Commission should, consistent with the clear language of the statute and legislative history, define a qualified municipally-owned station under Section 5(1)(1)(B) as a station whose total broadcast hours on a daily basis (between 6:00 a.m. and 12:00 p.m.) contain **more** than one half noncommercial educational program hours. If a station transmits 50% or less noncommercial educational programming it should not be counted against a cable system's quota for the carriage of noncommercial educational stations. Rather the

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8/ Webster's New Collegiate Dictionary, 1979.

9/ See H.R. Rep. No. 102-628, 102nd Cong. 2d Sess. (1992) (hereinafter "House Report"). This report accompanied H.R. 4850, the House version of the cable legislation. This version was merged, in conference with S. 12, the Senate version of the cable legislation and subsequently adopted as the 1992 Cable Act. The definition of noncommercial educational television station in H.R. 4850 is identical to that adopted in Section 5(1)(1) of the 1992 Cable Act.

station should more appropriately be carried under the commercial carriage requirement in Section 4.

2. Stations Operating on Nonreserved Channels

The Notice also queries when, if ever, the FCC should grant noncommercial educational status under Section 5 to stations or translators operating on channels other than those reserved for noncommercial educational use.

The answer is clear from the face of the statute: whenever a station holds a noncommercial broadcast license and otherwise complies with the definition of a "qualified noncommercial educational station" under Section 5(l)(1). Nowhere in the definition of a qualified noncommercial station is there any additional requirement that a station must be operating on a reserved channel. Any interpretation by the Commission that would add such a requirement would simply contravene the clear and unequivocal language in the Act.

Even if the Commission had any flexibility in this regard, the Notice provides no policy or public interest rationale for imposing this restriction and APTS believes there is none. The purpose of Section 5 -- to protect the public's access to noncommercial educational stations -- is served regardless of whether those stations operate on reserved or nonreserved channels.[10/]

[10/] Only a handful of noncommercial stations and translators are currently operating on channels that are not reserved in the Table of Allotments for noncommercial educations use

(continued...)

B. Definition of "Local" Noncommercial Educational Television Station

Under Section 5(1)(2), a qualified "local" noncommercial educational television station must satisfy one of two requirements:

(1) it must be licensed to a principal community whose reference point (as defined in 47 C.F.R. § 76.53) is within 50 miles of the principal headend of the cable system; or

(2) its Grade B service contour must encompass the principal headend of the cable system.

The Notice observes that the term "principal headend" is not defined under the 1992 Cable Act. It proposes that cable operators with multiple headend facilities be permitted initially to choose their principal headends, "so long as the choice is not intended to circumvent must-carry obligations." Notice at ¶ 8.[11/]

[10/](...continued)
including one of the premier public television stations in the country, WNET in New York. This channel allotment has no bearing on these stations' noncommercial licenses, their ownership structure, their qualification to receive a CPB grant, or their noncommercial educational program format.

[11/] The approach proposed in the Notice appears to be a variation of that initially contained in S. 12 (the Senate version of the cable legislation) but not adopted in the final Act. See S.12, Section 4(f). S.12, however, differs from the proposed formulation in one crucial respect: it is objective. It specifically prohibited a cable operator, regardless of intent, from using the designation of a principal headend to "undermine or evade the carriage requirements".

As discussed above, APTS believes that entrusting this important decision to the discretion of cable operators subject only to the constraint that they not act with the "intent" to subvert the statute, will insufficiently safeguard the purposes of the Act and will engender costly and unnecessary disputes. APTS believes it to be far preferable for the Commission to adopt objective principles to guide cable operators in making this determination.

As a starting point, it would suggest that the primary basis for such a determination should be the number of subscribers served by a headend, either directly or indirectly through other headends which receive their signals from that headend. In the absence of other compelling circumstances, there should be a presumption that the headend serving the largest number of subscribers, either directly or indirectly, is a system's principal headend. "Other compelling circumstances" should also be specified to as great an extent as possible. These circumstances would presumably include co-location of a headend with other central administrative, production and technical facilities of a cable system, though APTS anticipates that it will be quite rare that such a headend would not also qualify as the principal headend under a pure subscribership standard.

The cable industry may well have good reasons for preferring some other set of criteria to those proposed. But whatever the relative merits of various proposals, the

Commission should view with great skepticism any claim that it will be far more difficult to develop meaningful, objective criteria than it will be to implement and enforce on an on-going basis a broad and subjective standard such as that proposed in the Notice.

The Notice also seeks comments on appropriate procedures to govern the initial selection and any subsequent changes in the principal headend designation process. APTS would propose the following:

The Commission should require any cable system operator that has more than one headend to notify the Commission in writing of its initial designated principal headend within a time certain (e.g., 30 days from the effective date of the new rules). The designation should (1) list the locations of all of the system's headends; (2) designate the principal headend; and, (3) contain a statement detailing the basis for the cable system's determination.

At the same time the cable system should be required to (1) put a copy of its initial designation in its public file; and (2) serve the initial designation on all public television stations that (a) place a predicted Grade B signal over any portion of a cable system's service area, (b) are licensed to a principal community whose reference point is within 50 miles of any portion of the cable system's service area, (c) are carried by the cable system, or (d) have requested carriage on the cable system pursuant to Section 5.

Stations would be given an appropriate period, at least 60 days, to challenge any objectionable determinations and to negotiate a resolution with the cable operators and other affected stations.[12/]

At the conclusion of this period, cable systems should be permitted an opportunity to amend their designations in accordance with negotiations with affected noncommercial stations. Thereafter, the Commission should issue a Public Notice listing the principal headend designated by each cable system and solicit any challenges to the designation by affected stations or any other parties that believe the cable system's designation of a principal headend has the effect of circumventing the system's must carry obligations under Section 5.[13/]

Development of appropriate procedures, including allocating burdens of proceeding and proof, will depend in large part on the specific designation criteria the Commission adopts. As APTS has argued above, the more precise and

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[12/] Because of the potentially large number of notices each station will receive, a substantial time period should be permitted for responses and the initiation of negotiations. Every public television station is carried by many cable systems. As of October, 1992, 11,086 cable systems were in operation, an average of 33 for each of the 345 public television stations.

[13/] Should the Commission determine not to issue a full public notice of such listings, it must at a minimum provide an opportunity for challenge by stations who have been unsuccessful in their direct negotiations with cable operators.

objective the criteria, the narrower, more focussed and less costly to all will be the resulting inquiry. Whatever the criteria ultimately adopted, it should be clear that the burden of proving the reasonableness of a system's decision should fall initially on the cable system itself where a complaint demonstrates that the cable system's designation has rendered ineligible for carriage a station which could otherwise have qualified for carriage through the designation of another of the system's headends.

The cable system operator's designation of its principal headend should be effective indefinitely unless changed by order of the Commission in response to a petition from the cable operator stating the basis for the proposed change. The petition should be served on all potentially affected stations and the parties given an appropriate period to negotiate an informal resolution or file a challenge, with resolution in accordance with the procedures and standards applicable to initial designations.

APTS believes that these or similar procedures are essential to ensure that principal headend designation process does not become a mechanism for subverting or circumventing the must carry obligations in the Act.

II. SIGNAL CARRIAGE OBLIGATIONS

A. Discretion of Cable Operators to Select Stations to Carry

Section 5(b) of the Act, imposes limits on the number of noncommercial educational stations that small and medium-sized cable systems must carry. Cable systems with 12 or fewer activated channels are required to carry only one qualified local noncommercial station; cable systems with 13 to 36 channels are required to carry up to three such stations.

The Commission proposes that, where small or medium-sized cable systems receive requests for carriage in excess of the their carriage obligation under Section 5, the cable systems be permitted to exercise their discretion to select the station(s) they will carry. This discretion would be limited only by the requirement in Section 5(c) that cable operators must continue to carry all qualified local noncommercial educational television stations that they carried as of March 29, 1990. Notice at ¶ 12.

APTS strongly urges the Commission to adopt precise, objective criteria for determining the station(s) to be carried, rather than relying upon cable operators' discretion. As noted above, the primary purpose of the must carry provisions of the 1992 Cable Act was to counteract the monopoly power of cable operators' over local stations and their strong incentives to use that power for their own

economic reasons through carriage and channel positioning decisions. There is no reason to think that cable operators left with the discretion to discriminate among noncommercial stations are likely to be motivated by Section 5's public policy objective of assuring universal availability of local, noncommercial stations rather than by their own private economic incentives. For example, the cable system may choose to carry the station whose requested channel position requires the least alteration in its existing line-up of cable programming even where the station to be deleted has a demonstrably greater connection to the local community. Permitting cable operators, who are openly antagonistic to the basic intent and purpose of the must carry provisions,[14/] to decide what stations to carry would put at peril public policy objectives underlying the legislation.

APTS suggests instead that cable operators faced with requests in excess of their carriage obligations should be required to carry the in-state station that is most local unless the noncommercial educational stations involved agree otherwise. This is the station in the same state as the cable system whose primary community reference point is closest in miles to the cable system's principal headend.

[14/] NCTA and Daniels Communications, both representing cable operators, have challenged both Sections 4 and 5 of the Act on constitutional grounds in the United States District Court for the District of Columbia.

This objective test for selecting the station to carried in the event of a conflict will serve a critical purpose of the Act -- to insure carriage of the most local broadcast signals. Stations that are both in-state and closest to the cable headend are more likely to cover issues of concern to the local community and provide service to that community. This "most local" test is similar to the factors the Commission is required to consider in determining whether a commercial network affiliate is local to a cable system for purposes of carriage under Section 4. See Section 4(h)(1).

It may well be that isolated instances will arise when application of this, or any other simple and easy-to-administer standard, is inappropriate and selective waivers of the rule, upon petition by a cable system or a noncommercial station, may well be warranted. But such instances will surely be quite rare and costs of administering waiver requests quite small relative to the benefits of clear guidelines for statutory implementation.

B. Definition of 'Substantial Duplication'

Cable systems are permitted to deny requests for carriage of a station with "substantially duplicative" programming under Section 5 in two circumstances: (1) cable systems with 13 to 36 channels that carry one state network affiliate are not required to carry additional affiliates if the programming substantially duplicates that of the state network affiliate already carried (Section 5(b)(3)(C)); and

(2) cable systems with more than 36 channels that already carry three stations are not required to carry any additional stations whose programming substantially duplicates that of another public television station carried (Section 5(e)). The Act instructs that substantial duplication shall be defined by the Commission "in a manner that promotes access to distinctive noncommercial educational television services." Section 5(e).

The Notice proposes that a station be deemed to substantially duplicate the programming of another station if more than 50% of its weekly prime time programming consists of programming aired on the other station. The Notice notes that this definition is based on the existing definition of "unduplicated broadcast signal" in Section 76.33(a) of the Commission's rules, which relates to whether a cable system is subject to "effective competition" for rate-regulation purposes. Notice at ¶ 12.

Whatever superficial symmetry may arise from use of the definition employed in the effective competition context, the Commission must look first to the statute and the legislative history. As noted above, the language of the Act, which is identical to the provisions contained in both the initial Senate and House bills, is itself quite broad. But,

while the Senate Report[15/] is silent on this issue, the House Report contains a considerably more detailed instruction:

> "The term 'substantially duplicates' is intended to refer to the simultaneous transmission of identical programming on two stations which are eligible to assert signal carriage protection under [Section 5(a)(1)], and which constitutes a majority of the programming on each station. The Committee does not intend, however, that if two stations air programs of the same category (such as cartoons, movies or comedies), that each station's programming be considered as duplicating that of the other."

House Report at 94.

The House Report thus endorses a definition of "substantially duplicates" which encompasses only situations where the simultaneous transmission of identical programming on two stations constitutes a majority of the programming on each station. APTS believes that this standard better serves the statutory interests of promoting access to distinctive noncommercial educational services than the primetime standard proposed in the Notice.

First, by focussing on simultaneous transmission, the House Report definition recognizes the great value in time-shifting of educational programming by different stations in the same market. In many markets, for example, stations will stagger their showings of children's programming such as Sesame Street, to satisfy the flexible scheduling needs of families. Time shifting by stations in the same market

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15/ See S. Rep. No. 92, 102d Cong., 1st Sess. (1991) (hereinafter "Senate Report").

increases the audience for public television programming. Second, by focussing on the entire broadcast day rather than prime time, the House definition acknowledges that importance of all of public television's programming. Third, the House Report approach is simple and easy to administer, requiring only a side-by-side comparison of each time period rather a comparison of the entire broadcast schedule or an entire daypart such as primetime.

APTS suggests that, in adopting this definition, the Commission should also clarify that broadcasts of programs in foreign languages (e.g., the broadcast of the MacNeil/Lehrer News Hour in Spanish) are not duplicative of the English broadcasts of the same programs and that different episodes of the same program series are also not duplicative.

The Commission must also determine an appropriate method and time period over which to assess substantial duplication and prescribe procedures by which a station's status can be changed. APTS believes that the minimum comparative period should be one week and that it would be appropriate in the initial determination for the Commission to designate a "representative" week in the preceding year, i.e., a week which is neither in the "showcase" period for programming in the first few weeks of the fall season or during a pledge period.

The Commission may wish to establish in advance a standard representative week, though it may wish to announce a

different week at the end of each year to preclude any possibility of contrived scheduling.

Once a station has qualified for carriage on a system under Section 5 and carriage has been initiated, a cable operator should only be allowed to invoke the substantial duplication exemption upon the filing and approval of a properly supported petition demonstrating that in the preceding representative week the station substantially duplicated the programming of another qualified noncommercial station. Similarly, a station denied carriage on substantial duplication grounds should be permitted to obtain carriage by means of a properly supported petition demonstrating no substantial duplication in the most recent representative week.[16/]

[16/] As the Commission is well aware, the introduction of advanced television transmissions is imminent. See, e.g., Third Notice of Proposed Rulemaking, MM Docket No. 87-268 (released, October 16, 1992). The Cable Act also anticipates this development and instructs the Commission upon the adoption of new television technical standards to initiate a proceeding looking toward cable carriage of such broadcast signals. Section 4(b)(4)B). APTS comments on these issues here only to observe that the development of these new advanced transmission techniques may also permit broadcast stations to utilize both their new ATV channel and their existing channel in new and innovative ways that may impact carriage requirements in a number of ways. One example may be the possibility of a broadcast station multiplexing its channel to carry several "primary" signals, perhaps staggered at different time-shifted intervals. Whether and in what circumstances such stations would become "substantially duplicating" is an issue the Commission may well have to address.